FEDERAL CONTRACTS: THE YEAR IN REVIEW*

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I. SERVICES ACQUISITION REFORM ACT (SARA).

On November 24, 2003, President Bush signed the National Defense Authorization Act for FY 2004. Included within that Act, in Sections 1401 to 1443 is the Services Acquisition Reform Act (SARA), which changes the way the civilian acquisition work force will be trained and recruited and has a variety of other aspects dealing with the procuring of commercial services and goods and services for defense against or recovery from terrorism or nuclear, biological, chemical or radiological attack. Specifically, SARA Section 1431 establishes a government-wide incentive for the use of performance-based service contracts by treating service contracts or task orders under $25 million as contracts for "commercial items" (eligible for procurement under the simplified procedures of FAR Part 12 and reduced data requirements under the Truth and Negotiations Act). To so qualify, the contract or task order must specify a task and define it in measurable, mission-related terms, identify specific end products or output and contain firm fixed prices for each task or outcome.

In Section 1432, SARA expands the definition of commercial item to include time and material and labor hour type contracts for commercial services that are commonly sold to the public through such contracts and are purchased by the government on a competitive basis.

On 20 September 2004, the FAR Councils issued an advance notice of proposed rulemaking and notice of a public meeting regarding the use of time-and-materials (T&M) and labor-hour (LH) contracts for the procurement of commercial services.(69 Fed. Reg. 56316) The

* For parts of this I have relied on publications from the Army Judge Advocate General's School.

conditions to use FAR part 12 for such contracts include: "(1) the purchase must be made on a competitive basis; (2) the service must fall within certain categories prescribed by section 8002(d) of the Services Acquisition Reform Act; (3) the contracting officer must execute a determinations and findings (D&F) that no other contract type is suitable; and (4) the contracting officer must include a ceiling price that the contractor exceeds at its own risk and that may be changed only upon a determination documented in the contract file that the change is in the best interest of the procuring agencies." The goal is to authorize FAR part 12 treatment only when conditions warrant and when the terms and conditions in the contract adequately protect the parties' respective interests.

Section 1441 allows the heads of all executive agencies to use transactions other than contracts and grants, "Other Transactions," like those authorized under 10 U.S.C. 2371, to acquire research and development and prototypes for new technologies that have the potential to facilitate defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack.

Section 1443 authorizes use of streamlined procedures for the procurement of property or services in support of the contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical or radiological attack by raising the dollar thresholds for simplified acquisitions. *See* FAC 2001-26 *infra.* It also authorizes the use of simplified procedures for commercial item acquisitions for covered procurements for values up to $10 million, but agency head approval is required.

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement the special emergency procurement authorities of section 1443 of the Services Acquisition Reform Act of 2003 (Title XIV of Pub. L. 108-136). (FAC 2001-20 69 Fed. Reg. 8312) On 23 February 2004, the FAR Councils issued an interim rule which increases the micro-purchase and simplified acquisition thresholds for supplies or services that the agency head

determines are to be used to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack. In such acquisitions, the interim rule increases the micro-purchase threshold to $15,000 within the United States and $25,000 outside the United States; the simplified acquisition threshold increases to $250,000 for any contract awarded and performed or the purchase made, inside the United States; or $1,000,000 for any contract awarded and performed, or purchase made, outside the United States. See the definitions of Micro Purchase and Simplified Acquisition in FAR 2.101. The rule also authorizes the use of simplified acquisition procedures to acquire commercial items to the maximum extent practicable, up to five million dollars per FAR subpart 13.5.

The interim rule expands the definition of a commercial item. The contracting officer may treat any acquisition as a commercial item if the agency head determines the supplier or services are to be used to facilitate defense against or recovery from nuclear, biological, chemical or radiological attack. The simplified acquisition threshold increases to $10 million for such acquisitions. See FAR 13.500. The $5 million and $10 million thresholds do not apply to blanket purchase agreements established with Federal Supply Schedule contractors.

The Councils will publish a final rule upon receipt and evaluation of comments received in response to this interim rule.

II. NEW REGULATIONS

A. Federal Acquisition Circulars

FAC 2001-20, *see* pages above.

FAC 2001-21, March 26, 2004 is an interim rule amending FAR Parts 8, 19, 42, and 52, to implement Section 637 as Division F for the Consolidated Appropriations Act, 2004. Section 637 provides that no fiscal year 2004 funds shall be expended for purchase of a product or service offered by Federal Prison Industries, Inc., unless the agency making the purchase determines that the offered product or service provides the best value to the buying agency.

FAC 2001-22, issued on April 5, 2004, covers a variety of topics from government property disposal to unsolicited proposals, but it also deals with general provisions of the cost principles. Besides adding the definition of direct cost and making some revisions to the definition of indirect costs, at FAR 2.101, it tries to render those definitions consistent with terminology used in the Cost Accounting Standards. It also revises some of the forms which deal with property disposal and with termination for convenience.

FAC 2001-23, 69 Fed. Reg. 25274, May 5, 2004, is an interim rule implementing Section 308 of the Veterans Benefit Act of 2003, Procurement Program for Small Business Concerns Owned and Controlled by Service-Disabled Veterans. The law provides for set-aside and sole source procurement authority for service-disabled veteran-owned small business (SDVOSB) concerns. Under the Act and the implementing regulations, Contracting Officer may award contracts on the basis of competition restricted to SDVOSB concerns if there is a reasonable expectation that two or more SDVOSB will submit offers for the contracting opportunity and that the award can be made at a fair market price or award a sole source contract to a responsible SDVOSB concern if there is not a reasonable expectation that two or more SDVOSB concerns will submit an offer, the anticipated contract price (including options) will not exceed $5 million (for manufacturing) or $3 million otherwise and that the contract award can be made at a fair and reasonable price. This rule was finalized in FAC 2005-02

FAC 2001-24, 69 Fed. Register 3424, June 18, 2004, did a variety of things. Primarily it provided incentives for the use of performance-based contracting for services by allowing the government to treat certain performance-based contracts or task orders for services as commercial items if the value of a contract or task order is estimated not to exceed $25 million; and if each contract or task order sets forth specifically each task to be performed and for each task defines the task in measurable, mission-related terms, identifies the specific end products or output to be achieved, and contains firm, fixed prices for specific tasks to be performed or outcome to be

achieved. Furthermore, the source of the services must provide similar services to the general public under the terms and conditions similar to those offered to the federal government.

Also, the FAR Councils issued a final rule clarifying that the Javits-Wagner-O'Day (JWOD) program is a mandatory source of supplies and services when the supplies or services have been added to the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled (the Committee). The rule also added the website for the Procurement List and the address for the Committee offices. It also adds the ten new member states of the Eastern European community to the Trade Agreements Act exception to the Buy America Act.

FAC 2001-25, 69 FR 59697, October 5, 2005, did several things. First, it eliminated the Standard Form 1417, which was the Pre-Solicitation Notice (Construction Contract) which was used to announce to the public that the government would be interested in awarding a construction contract. SF 1417 was eliminated because it had become unnecessary because contracting officers provide access to pre-solicitation notices to the government-wide point of entry at www.fedbizopps.gov. So elimination of this form increased reliance on electronic business practices. Next, it announced the free trade agreements with Chile and Singapore which would entitle them to sell products to the government without the full restrictions of the Buy American Act.

Thirdly, the rule announced new rules on telecommuting for federal contractors this implements Section 1428 of the Services Acquisition Reform Act of 2003 which prohibits agencies from including a requirement in the solicitation that precludes an offeror from permitting its employees to telecommute or, when telecommuting is not precluded, from unfavorably evaluating an offeror's proposal that includes telecommuting unless it would adversely affect agency requirements, such as security.

Fourth, the FAC announced an interim rule extending to April 1, 2005, the Micro-purchase Exception from the requirement to purchase electronic and information technology that provides individuals with disabilities better access and use of information and data. This extension will

provide agencies time to update their purchase card training modules on Section 508 of the Rehabilitation Act of 1973 requirements and train their personnel.

FAC 2001-26, 69 FR 76339, December 20, 2004, covered several rules including the following:

- Electronic Representations and Certifications (FAR Case 2002-024). "This final rule requires offerors to provide representations and certifications electronically via the Business Partner Network (BPN) website; to update the representations and certifications as necessary, but at least annually to keep them current, accurate and complete…." On December 17, 2004, Deidre Lee, Director of Defense Procurement and Acquisition Policy issued a related memorandum on this requirement.

- Notification of Employee Rights Concerning Payment of Union Dues or Fees (FAR Case 2004-010). "This interim rule amends FAR Parts 2, 22, and 52 to implement Executive Order (E.O.) 13201, Notification of Employee Rights Concerning Payment of Union Dues or Fees, and Department of Labor regulations at 29 CFR part 470. The rule requires Government contractors and subcontractors to post notices informing their employees that under Federal law they cannot be required to join a union or maintain membership in a union to retain their jobs."

- Special Emergency Procurement Authority (FAR Case 2003-022). This final rule "increases the amount of the micro-purchase threshold and the simplified acquisition threshold for procurements of supplies or services by or for an executive agency that, as determined by the head of the agency, are to be used in support of a contingency operation or to facilitate the defense against or the recovery from nuclear, biological, chemical or radiological attack…." These latter acquisitions can also be treated as "commercial items." On November 24, 2004, Deidre Lee, Director of Defense Procurement and Acquisition Policy issued a memorandum on these increases and stated, for outside the United States, the micro-purchase threshold is $25,000 and the simplified acquisition threshold is $1,000,000 for the specified procurements.

- Excluded Parties List System Enhancement (FAR Case 2002-023). "This final rule amends the FAR to incorporate the Excluded Parties List System (EPLS), GSA's new searchable on-line electronic list of parties excluded from doing business with the Federal Government."

- Applicability of the Cost Principles and Penalties for Unallowable Costs (FAR Case 2001-018). "This final rule increases the threshold at FAR 42.709(b) and FAR 42.709-6 from $500,000 to $550,000 for contracts subject to penalties if a contractor includes expressly unallowable costs in a claim for reimbursement."

FAC 2001-27 (69 FR 77869, December 28, 2004) announced an interim rule (effective January 1, 2005) on Free Trade Agreements--Australia and Morocco which "allows contracting

officers to purchase the products of Australia and Morocco without application of the Buy American Act if the acquisition is subject to the Free Trade Agreements."

FAC 2005-01, 70 Fed. Reg., page 11736, March 9, 2005, is denominated as FAC 2005-01 because the federal government is in the process of re-issuing the 2005 version of the FAR which should come out later in March.

FAC 2005-01 contains several changes, but some are final rules, in which the FAR is being amended to incorporate these rules and any comment periods have already lapsed. Other rules are interim rules, which means they take effect, but are not intended to be final. Interested parties have the ability to contact the named analyst for each section and provide comments as to whether you believe the interim rule is a good idea, a bad idea or how it can be improved.

Item I, an interim rule, clarifies that architect engineer services offered under multiple award schedule contracts or under federal government-wide task and delivery order contracts must be performed under the supervision of a licensed professional architect or engineer and be awarded in accordance with the quality-based selection procedures in FAR Subpart 36.6.

Item II is also an interim rule and it amended the FAR by increasing the justification and approval thresholds for DOD, NASA and the US Coast Guard from $50 million to $75 million. This rule reduced the administrative burden of approving a justification for other than full and open competition by allowing the head of the procurement activity in DOD, NASA or the Coast Guard to approve justifications up to $75 million.

Item III is a final rule and it amends the FAR by extending until January 1, 2008, the ability of the agencies to use simplified acquisition procedures to purchase commercial items in amounts greater than the typical simplified acquisition thresholds ($100,000) but not exceeding $5 million ($10 million for acquisitions in support of "a contingency operation or to facilitate the defense against or recovery from, nuclear, biological, chemical or radiological attack.")

Item IV adds landscaping and pest control services to the Small Business Competitiveness Demonstration Program. This rule allows unrestricted competition in acquisition of landscaping and pest control services.

Item V is a final rule which deals with non-available items under the Buy American Act. The new rule clarifies that when an item is listed as unavailable that does not mean that the items is completely unavailable from US sources, but that the item is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality. Therefore, the final rule emphasizes that the Contracting Officer must conduct market research appropriate to the circumstances for potential domestic sources when acquiring an item on the list.

Item VI is a final ruling amending the FAR by revising Part 30 of the FAR which deals with cost accounting standards administration. The rule describes the process for determining and resolving the cost impact on contracts and subcontracts when a contractor makes a compliant change to a cost accounting practice or follows a noncompliant practice.

Item VII is an interim rule affecting contractors that have cost reimbursement contracts with the DOD, Coast Guard or NASA. Affected contractors that maintain a purchasing system approved by the Contracting Officer do not have to notify the agency before the award of any cost plus fixed fee subcontracts or fixed price subcontracts that exceeds the greater of the simplified acquisition threshold or 5% of the total estimated cost of the contract.

Item VIII is a final rule which revises the FAR by requiring the use of the clause at 52.244-6, Subcontractors of Commercial Items, and Solicitations in Contracts other than those for Commercial Items. This is to make it clear to Contracting Officers that the clause is required even in construction contracts that are not for the acquisition of commercial items.

As always, if you have particular questions regarding a new FAC, you should download the FAC from www.acqnet.gov/far.

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FAC 2005-02, 70 Fed. Reg. 14950, March 23, 2005, implemented the final rule providing for set aside and sole source procurement authority for Service-Disabled Veteran Owned Small Business (SDVOSB) concerns. This final rule implements the interim rule issued on May 5, 2004 with some modifications regarding the list of actions excluded from the SDVOSB program and it modifies the protest procedures.

FAC 2005-03, April 11, 2005 (70 Fed. Reg. 18954) made permanent the Best Value Requirement on purchases from Federal Prison Industries and established a permanent requirement for market research and a comparability determination before purchasing an item of supply listed in the FPI's schedule. This FAC also converted the interim rule published on October 5, 2004 to a final rule without change regarding the Section 508, Micro Purchase Exemptions. So all Micro Purchases made on or after April 1, 2005 must comply with the requirements of Section 508.

On April 8, 2005, the FAR counsel announced FAR case 2004-019 (70 Fed. Reg. 17945) for which the counsel proposed to amend the FAR to implement Earned Value Management System (EVMS) policy. Interested parties should submit comments in writing on or before June 7, 2005 to be considered in the formulation of a final rule.

B. Task or Delivery Orders Contract Periods

The DOD issued an interim rule amending the Defense Federal Acquisition Regulation Supplement's (DFARS) parts 216 and 217 to implement section 843 of the National Defense Authorization Act for FY 2004. 69 Fed. Reg. 1378 (March 23, 2004) This rule limits the contract period of a task or delivery order contract awarded pursuant to 10 U.S.C. section 2304a to no more than five years.

The Ronald W. Reagan National Defense Authorization Act for FY 2005 addressed a gray area regarding the extent of the FY 2004 limitation. Section 812 applies the 5-year maximum limitation to the base period only; the maximum limit for modifications or options is now ten years.

The head of an agency may extend the total contract period by documenting in writing "exceptional circumstances." Pub. L. No 108-375, 118 Stat. 1811 (2004)

C. Proposed Rule on Share-in-Savings Contracting

The FAR Councils proposed amending the FAR to authorize Share-in-Savings (SIS) contracts for information technology and published an advance notice on 1 October 2003 to solicit input. Based on the input received, this year the FAR Councils issued a proposed rule change to the FAR to "motivate contractors and successfully capture the benefits of SIS contracting."69 Fed. Reg. 40514(July 2, 2004) Under an SIS contract, the contractor finances the work and receives a percentage of any savings resulting from the work in future years. The agency would retain its share of the savings; the contractor, generally would only get paid if savings are realized. The agency head may approve, in writing, award of an SIS contract for a period greater than five years, but not more than ten years. The proposed rule requires the agency to fund any pre-negotiated termination costs and the first fiscal year; limited authority exists for contracts with unfunded contingent liability. The GSA awarded six SIS blanket purchase agreements in July 2004 potentially worth up to $500 million.

D. Other Federal Wide Regulations

1. A-76 – Bid Protests

GAO-Bid Protest Regulations, Proposed rule, 69 FR 75878, December 20, 2004. The Government Accountability Office (GAO) proposed to amend its Bid Protest Regulations, promulgated in accordance with the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. 3551-3556, to implement the requirements in the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108-375, 118 Stat. 1811, enacted on October 28, 2004. These were made final on April 14, 2005 (70 FR 19679). The amendments to GAO's Bid Protest Regulations implement the legislation's provisions related to the bid protest process, where a public-private competition has been conducted under Office of Management and Budget (OMB) Circular A-76, as revised on May 29, 2003, regarding an activity or function of a Federal agency

performed by more than 65 full-time equivalent employees of the Federal agency. In this regard, the legislation grants designated representatives of an in-house competitor the status of an "interested party" to file a protest at GAO or the status of an "intervenor" to participate in a protest filed at GAO. In addition, consistent with the legislation, GAO adds a provision to its Bid Protest Regulations stating that GAO will not review the decision of an agency tender official to file a protest (or not to file a protest) in connection with a public-private competition.

With the passage of the Ronald W. Reagan National Defense Authorization Act for FY 2005, Congress granted the agency tender officials (ATO) limited, yet significant bid protest rights. PUB. L. 108-375, 118 STAT. 1811 (2004) The Authorization Act amends the CICA's definition of "interested party" by specifying that term includes ATOs in public-private competitions involving more than sixty-five FTEs. The new authority also provides that ATOs "shall file a protest" in a public-private competition at the request of a majority of the affected federal civilian employees "unless the [ATO] determines that there is no reasonable basis for the protest." The ATO's determination whether to file a protest "is not subject to administrative or judicial review," however, if the ATO determines there is no reasonable basis for a protest, the ATO must notify Congress. Further, in any protest filed by an interested party in competitions involving more than sixty-five FTEs, a representative selected by a majority of the affected employees may "intervene" in the protest. This new protest authority applies to protests "that relate to [Revised A-76] studies initiated . . . on or after the end of the 90-day period beginning on the date of enactment of [the Authorization Act]."

2. Interest

The new treasury rate for interest payments under the Contract Disputes Act or the Prompt Payment Act for the period beginning January 1, 2005 and ending on June 30, 2005, the prompt payment interest rate is 4.250 per centum per annum.

3. Labor Unions

On March 29, 2004, the Office of Labor-Management Standards ("OLMS") published a final rule to implement Executive Order 13201, which was signed by President George W. Bush on February 17, 2001. The final rule contains minor changes made as a result of comments received regarding the notice of proposed rule-making ("proposed rule" or "NPRM") published on October 1, 2001. See 66 FR 50010. Executive Order 13201 ("the Executive Order," "the Order," or "EO 13201") requires non-exempt government contractors and subcontractors to post notices informing their employees that under Federal law, those employees have certain rights related to union membership and use of union dues and fees. The Order also provides the text of contractual provisions that Federal Government contracting departments and agencies must include in every government contract, except for collective bargaining agreements and contracts for purchases under the Simplified Acquisition Threshold. These provisions include the language of the required notices, and explain the sanctions, penalties, and remedies that may be imposed if the contractor or subcontractor fails to comply with its obligations under the Order. Covered government contractors and subcontractors must include these same provisions in their non exempt subcontracts and purchase orders, so that the provisions will be binding upon each subcontractor or vendor. The final rule provides the text of the required contractual provisions, explains exemptions, and sets forth procedures for ensuring compliance with the Order; it also contains other related requirements. DOL-Obligations of Federal Contractors and Subcontractors; Notice of Employee Rights Concerning Payment of Union Dues or Fees; Final Rule, 69 FR 16375. *See* Discussion of FAC 2001-26 earlier.

4. Wage Determination

Davis-Bacon prevailing wage information is now available on line to the public. The database is maintained by the United States Government Printing Office and is indexed and searchable by state, construction type, and/or wage determination number. The database may be found at www.access.gpo.gov/davisbacon.

After a great deal of development and testing, the Labor Department has its new website regarding Service Contract Act Wage Determinations is now available (www.wdol.gov).

The FAR Councils proposed several changes to the FAR relating to labor standards in construction contracts.68 Fed, Reg. 74,403 (December 23, 2003) The Councils propose revising the definitions of "construction, alteration, or repair" and "site of the work" to conform to the Department of Labor's (DOL) revised definitions. The DOL revised the definitions pursuant to appellate court decisions, which concluded the DOL's application of the regulatory definitions was at odds with the language in the Davis-Bacon Act (DBA). The proposed rule revises the "site of work" definition to include material or supply sources or toll yards within the meaning of the "site of work" only when such sources or toll yards are dedicated to the covered construction project and are adjacent to or virtually adjacent to where the building or work is being constructed.

The FAR Councils have also proposed changes to the definitions of "apprentice," "trainee," "building or work," and "public building or public work." In addition, a revision clarifies the Contract Work Hours and Safety Standards Act (CWHSSA)1048 flow down requirements. A change to the "statement and acknowledgment" form ensures subcontractor certification only occurs if the contractor includes the "Contract Work Hours and Safety Standards Act overtime compensation clause" in its contract. Other proposed changes include requiring funds withheld under the Davis Bacon Act to be directed to the Comptroller General for payment to owed employees and minor administrative updates to various clauses.

5. Equal Employment Opportunity

The Office of Federal Contract Compliance Programs (OFCCP) has promulgated regulations requiring covered federal contractors to maintain certain employment records for OFCCP compliance monitoring and other enforcement purposes. These regulations were amended on November 13, 2000, to require employers to be able to identify, where possible, the gender, race and ethnicity of each applicant for employment. OFCCP promulgated this regulatory requirement to govern OFCCP compliance monitoring and enforcement purposes (e.g., to allow

OFCCP to verify EEO data), consistent with the Uniform Guidelines on Employee Selection Procedures.

The Uniform Guidelines on Employee Selection Procedures were issued in 1978 by the Equal Employment Opportunity Commission, the Department of Labor, the Department of Justice, and the predecessor to the Office of Personnel Management ("UGESP agencies"). The Uniform Guidelines on Employee Selection Procedures require employers to keep certain kinds of information and detail methods for validating tests and selection procedures that are found to have a disparate impact.

In 2000, the Office of Management and Budget instructed the Equal Employment Opportunity Commission to consult with the Department of Labor, the Department of Justice, and the Office of Personnel Management and "evaluate the need for changes to the Questions and Answers accompanying the Uniform Guidelines necessitated by the growth of the Internet as a job search mechanism."

The UGESP agencies recently have promulgated interpretive guidelines in question and answer format to clarify how the Uniform Guidelines on Employee Selection Procedures apply in the context of the Internet and related technologies. The recent interpretive guidelines expressly contemplate that "[e]ach agency may provide further information, as appropriate, through the issuance of additional guidance or regulations that will allow each agency to carry out its specific enforcement responsibilities." The rule proposed would amend OFCCP recordkeeping requirements for OFCCP compliance monitoring and other enforcement purposes to conform to the new interpretive guidance promulgated by the UGESP agencies. Written comments were due by May 28, 2004. (69 FR 16445, March 29, 2004).

E. Federal Manager's Guide to Competitive Sourcing

The OMB and Federal Acquisition Council (FAC) issued the second edition of the Manager's Guide to Competitive Sourcing (Manager's Guide) in February 2004. For practitioners

new to competitive sourcing, the Manager's Guide includes a "primer" section, as well as an appendix for "frequently asked questions." The Manager's Guide also incorporates "best practices" from several federal agencies and includes web links to the training/guidance documents available from the various executive agencies. http://www.whitehouse.gov/results/Eileen-FAC-Manager-Guide.pdf.

F. Performance Based Acquisitions

On 21 July 2004, the FAR Councils proposed to amend the FAR by replacing the referenced terms "performance-based contracting (PBC) and performance-based service contracting (PBSC)" with "performance-based acquisition (PBA) and performance-based service acquisition (PBSA)." 69 Fed. Reg. 43712 (July 12, 2004)

III. PRE AWARD

A. Protests/Standing/Privity

In *Blue Water Environmental, Inc. v. United States,* 2004 WL 717110 (March 31, 2004), a would-be Brookhaven National Laboratory (BNL) subcontractor filed a bid protest in the Court of Federal Claims challenging an award by BNL's M&O contractor. This appears to be the first M&O subcontract protest filed since the COFC's bid protest jurisdiction expanded to include post-award protests. Judge Firestone issued a decision dismissing the protest for lack of jurisdiction, holding that Brookhaven is neither a federal agency nor an agent of DOE. Judge Firestone concluded that the U S West test for determining purchasing agent status applied, and was not met. The court relied on the standard provision in BSA's contract that "subcontracts shall be in the name of the contractor, and shall not bind or purport to bind the government" made clear that BSA did not have the authority to act as a purchasing agent. The court also reviewed evidence showing that DOE was not engaged in "day to day supervision" of the work of the subcontractor or subcontracting process so as to create any possible agency. In light of the lack of evidence supporting this theory,

the court did not take a position on whether day to day supervision would create jurisdiction under the Tucker Act.

A. Timeliness of Proposal Submission

In *InfoGroup Inc.*, B-294610, (September 30, 2004) the offeror submitted its proposal through a FedEx courier but unfortunately forgot to tell FedEx the room number for the receipt of proposals. The FedEx employee entered the Department of Transportation unescorted, attempted to call the contracting officer, and returned to FedEx unsuccessful. The GAO refused to hold the agency responsible for failing to have an escort available the day proposals were due.

B. Timeliness of Questions

Allied Materials & Equipment Co., Inc., 2004 U.S. Comp. Gen. LEXIS 17 (Comp. Gen. 2004). The Defense Logistics Agency ("DLA") published a synopsis of an upcoming request for proposals ("RFP") on the "FedBizOpps" website. The notice informed potential bidders of the proposed closing date and included contact information for DLA contracting personnel. The DLA failed to comply with the FAR, which requires that the RFPs for any solicitations which are initially synopsized on the "FedBizOpps" website must also subsequently be posted to that website. A contractor protested that DLA's failure to post the solicitation to "FedBizOpps," as required by the FAR, improperly denied it the opportunity to compete for the contract. The contractor's protest was denied because the protester waited until seven weeks had passed after the closing date to contact the agency and inquire into the status of the procurement.

C. Cancellation of Solicitation

First Enterprise, 2004 WL 35556, B-292967, January 7, 2004, 2004 CPD 11, January 7, 2004. Determination to cancel invitation for bids after bid opening is unobjectionable where the bids exceeded the funding allocated for the construction project, irrespective of any dispute concerning the validity of the government estimate.

After the low bidder for the construction of a clinic withdrew its bid due to a mistake, the Department of Veteran's Affairs ("VA") decided to reject all remaining bids and cancel the invitation

for bids ("IFB") because, among other reasons, all remaining bids exceeded the amount of funding available for the project. The VA then amended the solicitation to include an additional alternate deductive item and converted the IFB to a request for proposals, which consequently was awarded to another bidder. The contractor, which would have been awarded the contract as the remaining low bidder under the original IFB, alleged that the VA had no compelling reason to cancel and covert the IFB to a negotiated procurement. The contractor's protest was denied.

D. Evaluation

Banknote Corporation of America, Inc. And Guilford Gravure, Inc., v. United States et al., CAFC No. 5104, April 26, 2004. Post award bid protest of a "best value" US Postal Service award. The CAFC affirms the decision of the COFC denying the protest. Judge Plager agrees that in view of GAO bid protest cases holding that when "a solicitation indicates that price will be considered, without explicitly indicating the relative weight to be given to price versus technical factors, price and technical considerations will be accorded approximately equal weight and importance in the evaluation" the "Contracting officer in this case made a reasonable judgment when he considered price and technical to be approximately equal and ultimately concluded that the additional cost of Guilford's proposal would not offset its strong technical evaluation".

Paraclete Armor & Equipment, Inc., 2004 WL 594988, B-293509, February 24, 2004. "We'll do what ever is desired"-Not an Adequate Response. Agency reasonably determined that the protester's proposal contained elements of risk that justified the award of a contract to an offeror that had submitted a slightly higher-priced proposal.

In *Lockheed Martin Corp.*,B-293679, 2004 CPD 115, the GAO commented on the rule that discussions, when conducted, must be meaningful. The GAO made it clear that the agency, through its questions and especially its silence, must avoid misinforming the offeror about the government's requirements.

The Army issued an RFP to perform system development and demonstration and low-rate initial production of the XM395 precision guided mortar munition. A key element of the most

important technical evaluation factor, ownership costs, revolved around the agency's assessment of the bidders' average unit production cost (AUPC). The RFP stated that the Army would evaluate AUPC for "desirability" and subject estimates to a cost realism assessment.

The Army established a competitive range that included Lockheed Martin (Lockheed) and Alliant Techsystems Inc. (ATK). In evaluating Lockheed's AUPC proposal, the Army excluded all proposed costs that were contractor specific due to the possibility that the contractor may not work on the program during follow-on production. The Army's calculation for AUPC dealt with only design specific costs, using industry rates.

During discussions with Lockheed, although the Army informed Lockheed of its AUPC rating, the Army did not inform Lockheed that it was excluding Lockheed's proposed savings from the cost realism analysis. Lockheed referred to both possible contractor-specific and design-specific savings during its discussions with the Army. In addition, although the Army made an error in evaluating Lockheed's cost factor, the Army failed to correct the error during discussions. After review of final proposal revisions, the Army selected ATK for award, in part because of the reduced rating on Lockheed's ownership costs due to the AUPC estimate.

The GAO found that the discussions between the Army and Lockheed were not meaningful because the Army failed to indicate to Lockheed that contractor-specific savings were excluded from AUPC, and the Army failed to address with Lockheed that it understated the AUPC due to its application of improper cost factors. As a result, the GAO recommended reevaluation of the award to ATK, to include redoing meaningful discussions with the competitive range offerors.

E. Small Business

Small Business Size Regulations; Government Contracting Programs; HUBZone Program, Final rule, 69 FR 29411, May 24, 2004.This final rule amends the regulations governing the Historically Underutilized Business Zone (HUBZone) Program. In particular, this rule addresses statutory amendments made by the Small Business Reauthorization Act of 2000, clarifies several regulations, and makes some technical changes, including changes to Web site addresses. In

addition, this rule amends those size and government contracting regulations that address subcontracting limitations. This rule is effective June 23, 2004.

Small Business Size Regulations; Rules of Procedure Governing Cases Before the Office of Hearings and Appeals, Final rule, 69 FR 29192, May 21, 2004.This final rule amends the SBA's small business size regulations and the regulations applying to appeals of size determinations. In particular, this rule amends the definitions of affiliation and employees. It also makes procedural and technical changes to cover programs such as the SBA's HUBZone Program and the government-wide Small Disadvantaged Business Program. Further, the rule codifies several long-standing precedents of the SBA's Office of Hearings and Appeals and clarifies the jurisdiction of that office. The rule is effective on June 21, 2004. These amendments apply to all solicitations issued on or after the effective date, as well as all applications for financial or other assistance pending as of or submitted to the SBA on or after the effective date.

In *Red River Service, Corp. v. United States,* 60 Fed. Cl. 532 (2004) the COFC, reversing an SBA finding, remanded a NAICS code determination to the agency for further consideration. The issue arose in an Air Force RFP for monthly operation and maintenance services for telecommunication systems covering four bases. To obtain these services, the contracting officer included the North American Industrial Classification Code System (NAICS) 811212, "Computer and Office Machine Repair and Maintenance" in the solicitation. To qualify as a small business within this code category, a firm may not have more than $21 million in annual receipts.

After seeing the solicitation's NAICS code, Red River called the contracting office and the local business specialist and requested that the Air Force change codes and use the "Wired Telecommunications Carriers" code instead. To qualify as a small business within this code category, a firm may not have more than 1500 employees. Despite a recommendation from the Chief of the Contracting Division and the small business specialist to change codes, the contracting officer refused.

Red River first appealed the code selection to the SBA. The SBA upheld the initial code selection, noting that the code 811212 best matches the statement of work and that Red River did not meet its burden to prove that the contracting officer's code selection was based on clear error of fact or law. This protest to COFC followed.

The COFC first addressed jurisdiction. Although concluding that it did not have jurisdiction to review the SBA's NAICS determination, the COFC held that it has jurisdiction over this case because Red River is an interested party. That is, Red River demonstrated a connection to the procurement and has an economic interest in the procurement.

On the merits, Red River alleged the Air Force, in selecting the wrong NAICS code, "violated a statute or regulation in connection with a procurement" and requested a preliminary injunction stopping the Air Force from proceeding with the contract. The COFC agreed. The court noted that the solicitation repeatedly used the word "telecommunication" or a derivative thereof, and contrasted it with the selected "Computer and Office Machine Repair and Maintenance" NAICS code. This code continually used the word "computer" or a derivative thereof. Highlighting the discrepancy between the solicitation's expressed needs and the NAICS code language, the court remanded the matter to the agency for further consideration.

In addition, the court observed that the contracting officer did not give "primary consideration to the relative value and importance of the components of the procurement" when selecting the Computer and Office Machine Repair and Maintenance NAICS code. Furthermore, the determination that 63%-73% of the procurement is more closely related to telecommunications system maintenance than to computers also supported the court's ruling.

F. New Website

The SBA released a website that should help connect small businesses with federal agencies. This webpage provides one-stop information regarding business development plans, financial assistance, taxes, laws and regulations, international trade, workplace issues, buying and selling, and access to federal forms. The address for this webpage is www.Business.gov.

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G. Reverse Auctions

Reverse auctions continue to increase. Reverse auctions typically involve a secure web site where pre-approved bidders and submit their bids. The web site then will display the low bid but not the identity of the bidder. The other bidders then get to keep bidding to displace the low bidder. The AGC is vehemently opposed to the practice. For more information, see the AGC website at http://www.agc.org/page.ww?section=Reverse+Auctions+Resource+Center&name=Reverse+Auctions+Resource+Center

H. Out of Scope Change

The COFC confronted an out of scope modification in *CW Government Travel, Inc. v. United States,* 61 Fed. Cl. 559 (2004) In 1998, the Military Traffic Management Command (MTMC) awarded TRW (whose successor is Northrop Grumman) the Defense Travel System, Defense Travel Region 6 (DTS DTR-6) contract for a "seamless, paperless, and complete travel management service." Whereas "traditional travel services" are delivered through conventional means (i.e., live or telephonic interaction between traveler and travel agent) this contract envisioned an "automated travel management system to be known as the Common User Interface ('CUI')." In essence, the contract sought a government equivalent of the services currently found on the web at Orbitz.com, Travelocity.com or Expedia.com.

In 2002, the government issued several modifications to restructure DTS DTR-6. The modifications, inter alia, "added traditional travel services to the contract." The plaintiff, CW Government Travel (Carlson), alleged that the modification constituted an out-of-scope change and that failing to compete the "traditional travel services" violated the Competition in Contracting Act (CICA). The COFC treated the issue as a matter of contract interpretation. Citing familiar interpretation principles, the court sought to determine the parties' intent through the parties' "contemporaneous interpretation" during contract performance. The court sought an interpretation which gave all parts of the contract a reasonable meaning rather than one that left a portion of the

contract "useless, inexplicable, inoperative [or] void . . . ." The court first determined that the contract language in the Performance Work Statement did not require TRW to supply traditional travel services. Further, the course of dealing between the parties during performance buttressed the interpretation that traditional travel services were beyond the scope of DTS DTR-6.

The court next looked at whether the modification violated the CICA. The court recognized that materially modifying the original contract violates the CICA "by preventing potential bidders from . . . competing" for the new work. If potential bidders, at the time of the original procurement's award, would not have anticipated that the new work could have been ordered under the changes clause, then the modification is beyond the scope of the contract and should be competed. In the instant case, the COFC found the traditional travel services were beyond the scope of the DTS DTR-6 contract. Specifically, "a potential contractor bidding on the original contract to deploy and provide travel services using a CUI would not have anticipated that it could also be called upon under the changes clause to provide traditional travel services." The court concluded, because the additional services materially altered the work required under the contract, "MTMC's failure to issue a competitive solicitation for the traditional travel services . . . violated CICA."

Cardinal Maintenance Service, Inc. v. The United States and Navales Enterprises, Inc., Defendant-Intervenor, COFC No. 04-94C, November 22, 2004. Post-award bid protest. Protest filed about 11 months after award of Air Force custodial services contract. Judge Firestone grants the plaintiff's motion for an injunction and orders the Air Force to recompete the contract. The court finds that the government's post-award changes materially changed the contract. Judge Firestone holds that "...where, as here, the government modified the contract to allow for changes not contemplated in the original contract, the government cardinally changed the contract; by doing so without resoliciting the contract, and by instead eliminating the limitations on changes specifically set forth in the original contract, the government violated CICA."

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I. J & A's

In *Kearfott Guidance and Navigation Corp.*, B-292895.2, 2004 CPD 123, the protestor challenged The Navy Strategic Systems Programs' (SSP) sole-source award to The Charles Stark Draper Laboratories (Draper) to "establish and certify an integrated support facility for repair and refurbishment of the MK 6 guidance system used in the Trident II (D-5) submarine-launched ballistic missile."

The MK 6 guidance system guides D-5 missiles, which the Navy launches from submerged Trident submarines. They have a range of "4,600 miles; can travel at speeds greater than 20,000 feet per second; and [are] capable of carrying multiple, nuclear-armed warheads, each of which can be independently targeted." In other words, a lot rests on the accuracy of the guidance system. "Precise interaction" among six main subsystems determines the missiles' accuracy. The guidance system is one of those subsystems. The guidance system is composed of "two assemblies." The electronic assembly contains six computers. The guidance system is composed of, among other components, "inertial measurement units," gimbals, "pendulous integrating gyro accelerometers," and stellar sensors. In other words, the guidance system is quite complex.

Submarine Launched Ballistic Missile (SLBM) nuclear weapons systems date back to the 1950s. From the very beginning and continuing to the current guidance system, Draper had been the sole prime contractor "responsible for the design, development, initial production and repair" of each generation of SLBM guidance system. In 2003, the agency announced its intention to award Draper a sole-source contract "as the 'only known source' capable" of establishing an integrated support facility [ISF] "for repair and refurbishment of the Trident II (D-5) MK 6 missile guidance subsystem." Kearfott protested, alleging it also had the capability to create and maintain the ISF.

The SSP's Justification and Approval (J & A) for a non-competitive award cited 10 U.S.C. section 2304(c)(1)—only one responsible source would satisfy the agency's needs. Focusing on the "rationale and conclusions" in the J & A, the GAO found the justification reasonable and

therefore did not object to the award. The Comptroller General concurred with the agency's evaluation that only Draper, with over "forty years as the sole design and development agent," had "overall knowledge" of all the key components of the guidance system. Kearfott, a manufacturer of a component of the system, lacked "familiarity with at least two MK 6 guidance system components," and lacked overall knowledge of the interaction of the various subsystems. Therefore, only Draper could adequately establish and certify an ISF for the MK 6 guidance system.

J. Bid Bonds-An Issue of Responsiveness and Responsibility

The GAO has held that bid documents accompanying a bond must establish unequivocally at the time of bid opening that the bond would be enforceable against the surety. Bid bonds accompanied by a photocopy of a POA are therefore unacceptable and the bid nonresponsive. In *All Seasons Construction, Inc.,* B-29166.2, 2002 CPD 2/2, the GAO found that a computer generated POA with mechanically applied signatures "look[ed] more like a photocopy than a document generated by a computer printer." The GAO acknowledged the authority to use mechanically applied signatures but only when the signature is affixed after the power of attorney has been generated. The COFC agreed with the GAO, finding that "photocopies of bid guarantee documents generally do not satisfy the requirements for a bid guarantee since there is no way, other than by referring to the originals after bid opening, to be certain that there have not been alterations to which the surety has not consented, and that the government would therefore be secured." 55 Fed. Cl. 175 (2003)

IV. POST AWARD

A. Modifications

Turner Constr. Co., Inc. v. United States, 2004 U.S. App. LEXIS 9321 (Fed. Cir. 2004). A contractor entered into a contract with the Department of Veterans Affairs ("DVA") for construction

of an addition to a DVA Medial Center. During construction, the contractor disagreed with the DVA resident engineer about whether the contract required certain fire-related electrical feeders and panelboards in the operating room area on the third floor of the addition. The DVA engineer directed the contractor to install the disputed materials and the contractor completed the work and sought the additional costs it had incurred for the work. Although the contract specifications and electrical drawings did not require such fire-related feeders, the DVA argued that the contract should have been read to include the fire-related electrical installations based upon the contract's requirement of compliance with the applicable electrical codes, which took priority over any inadequacy in the contract specifications or error in the electrical drawings. Further, the DVA argued that the contract was ambiguous and the contractor had a duty to inquire during the bidding process about the erroneous drawings. The Court ruled that the DVA's requirement that the contractor install additional fire-rated systems was a material change for which the contractor was entitled to recover its incurred costs. Despite the DVA's assertions to the contrary, neither the contract, its specifications, the drawings, nor the electrical codes specified fire-rating for the operating room panels and electrical feeders. Accordingly, the contract was not ambiguous and the contractor's reading of the contract and the electrical codes was that of a reasonable and prudent contractor. The DVA's directive to install fire-rated systems not required by the original contract was a material change for which the contractor was entitled to additional compensation.

The courts and boards have continued to rule that contractors can recover for an inaccurate estimate in requirements or ID/IQ contracts that do not take into account facts known at the time of award. In *Hi-Shear Technology Corp. v. United States*, 356 F. 3rd 1372 (Fed. Cir. (2004) the CAFC affirmed a COFC decision, granting damages due to a faulty estimate in a requirements contract. The appellate court rejected the contractor's argument that an equitable adjustment in the contract price was the only acceptable method for determining damages in this type of case. The court affirmed the rule that "anticipatory lost profits are not available for the overestimated unordered

quantities." The court also rejected Hi-Shear's claim for reliance damages, stating that Hi-Shear's claim was another way to ask for total costs damages which is generally disfavored as a method of recovery.

The COFC recalculated new estimates using a government witness' recommended formula. The COFC then granted partial fixed overhead costs and general and administrative costs based on the new estimates. The CAFC found that the COFC's analysis reasonable and consistent with previous case law. The court emphasized that the lower courts had flexibility in determining damages in these types of cases.

B. Default Termination

B.V. Constr., Inc., 2004 ASBCA LEXIS 34, ASBCA No. 47766 (2004), A contractor was awarded a government contract to build a "space frame" patio cover at a National Aeronautics and Space Administration ("NASA") visitor's center. The contractor was required to complete the work by a stipulated date. During construction, the contractor discovered that the soil conditions did not comply with the contract specifications, requiring redesign and a work stoppage. As a result of the work stoppage, the contractor could not complete the work by the contract deadline. However, NASA did not terminate the contract for default or establish a new completion date, but instead allowed the contractor to continue performance. After some time, NASA terminated the contract for default and the contractor appealed the default. The Board of Contract Appeals ruled NASA waived the right to terminate the contract for default on the grounds of late completion. "When a performance date has passed and the contract has not been terminated for default within a reasonable time, time does not again become of the essence until the government issues a notice that sets a new time for performance, which is both specific and reasonable from the standpoint of the performance capabilities of the contractor at the time notice is given." Accordingly, because NASA failed to reach agreement with the contractor on a new completion date, NASA was

prohibited from terminating the contract for default; the default was converted to a termination for convenience of the government.

In *Necco Inc. v. GSA,* GSBCA No. 16354, March 1, 2005, the government had terminated a contract for default after the contractor failed to provide a construction schedule and its subcontractor could not start the work because of other jobs. Necco argued that the government COR had offered to delay the start of the work until Spring. The Board rejected this argument finding first that no such offer was ever made, but then it discussed the authority of the Contracting Officer's representative and held that the contractor's interpretation of the contract describing the COR's authority as granting him that authority was unreasonable.

C. Convenience Termination

In *International Data Products Corp. v. U.S.*, COFC No. 01-459C, et al., March 28, 2005, the Air Force correctly terminated an 8(a) contractor for convenience when the 8(a) firm informed the government that it was being sold to a large business. The IDIQ contract had a $100,000 minimum and the Air Force had ordered some $35 million worth of goods and services at the time of termination. The government was requiring a contractor to provide warranty services for the $35 million worth of material. The court, however, rejected that argument. It held that the clear requirement of the statute was to prevent non-disadvantaged businesses from performing 8(a) contracts. That goal would be achieved only if the termination requires the contractor to cease all performance under the contract, including warranty and upgrade work. So if the government required the contractor to do that, they would have to pay for it.

D. Claims

In *Lighting & Power Services, Inc. v. Roberts*, 354 F.3d 817 (8th Circuit 2004), the court held that a surety on a Miller Act bond is liable for delay damages of a subcontractor where a subcontractor and general contractor acknowledge that all delays are the responsibility of the federal government. The court also held that the subcontractor may submit its cost using the total cost method.

PCL Constr. Servs, Inc. v. United States, 2004 U.S. App. LEXIS 6706 (Fed. Cir. 2004).The United States Bureau of Reclamation ("USBR") provided a contractor with the drawings for construction of a parking structure and visitor's center at the site of the Hoover Dam. Due to substantial inaccuracies in the drawings, the design of some of the parking structure's supports had to be revised when the actual contours of the surface of the canyon were ascertained during construction. When the contractor failed to achieve substantial completion of the parking structure until more than one year after the contract deadline, it asserted that this delay resulted from USBR's breach of contract in providing drawings containing substantial errors. The contractor sought to hold USBR responsible for the entire cost of the project's delay. The Court ruled that even if USBR breached its contractual obligation to provide accurate drawings, the contractor failed to establish that the breach caused disruption or delay to substantial completion for which USBR was responsible.

Under such circumstances, the contractor had the burden to "show the nature and extent of the various delays for which damages are claimed and…connect them to some act of commission or omission" by USBR. Although the contractor provided evidence of delay by USBR in providing revised drawings, the contractor failed to show a cause and effect relationship between USBR's contract changes and the contractor's increased costs. For example, the contractor failed to conduct a critical path analysis or otherwise establish that USBR was responsible for any quantified amount of delay attributable to specific errors in the drawings. Accordingly, the contractor failed to satisfy its burden of proof on the issue of causation.

In *Singleton Contracting Corp. v. Harvey*, (Court of Appeals for the Federal Circuit, January 26, 2005), the Army had terminated Singleton's contract for convenience because the government's plans and specifications contained substantial errors. In the termination settlement proposal, Singleton requested unabsorbed overhead claiming that it had been delayed in its ability to start work. This was denied because the contract required that before Singleton could start work, it must submit an insurance certificate to the government that it never did.

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Fraser Constr. Co. v. United States, 57 Fed. Cl. 56 (Fed. Cl. 2003). The Army Corps of Engineers (Corps) awarded a fixed-price contract for dredging a river. Elevated water impeded the contractor's work during the course of the project but, the Corps refused to grant the contractor an extension of time based upon the high water flows. By adjusting its equipment and scheduling, the contractor completed the work by the contractual deadline, but incurred a cost much higher than the contract price. The contractor claimed that the Corps had constructively accelerated the work schedule by refusing to grant a time extension for an excusable delay based upon the high water from the river. The Court ruled: The contractor should have anticipated the problems encountered due to high peak water flow; therefore, the resulting delay was not excusable and the contractor was not entitled to an extension of time. According to the contract, a delay was excusable if it arose from unforeseeable causes beyond the control and without the fault or negligence of the contractor. An occurrence is not unforeseeable merely because the probability of such occurrence is low. Because hydrological records indicated that peak water flows, such as the one experienced in this case, could be expected once every five years, the contractor was charged with foreseeing and protecting against the possibility of such occurrence.

In *CPS Mech. Contractors, Inc. v. United States,* 59 Fed. Cl. 760 (Fed. Cl. 2004), the contractor alleged that the Army had directed it to perform work that was beyond the scope of its contract. The contractor performed the work as directed, but protested by sending several letters to the contracting officer stating that the additional work entitled the contractor to an equitable adjustment under the contract. The contracting officer responded that the work was required by the original contract and no additional compensation was authorized. When the contractor filed suit seeking an equitable adjustment, the Army argued that the contractor had failed to satisfy the requirements of the Contract Disputes Act of 1978 (the "CDA") by failing to submit to the contracting officer a written demand seeking payment of a sum certain.

The Court ruled that the contractor was not entitled to an equitable adjustment for the alleged additional work because it had failed to assert a "valid" claim under the CDA.

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For a contractor's submission to a contracting officer to be a "valid" claim under the CDA, "[i]t must be (1) a written demand or assertion, (2) seeking, as a matter of right, (3) the payment of money in a sum certain." In this case, although the contractor's letters put the contracting officer on notice of the basis of the contractor's claim for equitable adjustment, the contractor failed to submit in writing a clear and unequivocal statement of the sum certain amount of the claim. Also, the contracting officer could not have determined the sum certain sought by mathematical calculation from the contractor's letters. Because the contractor failed to satisfy the sum certain requirement of the CDA, the contracting officer could not meaningfully review the claim.

In *R. P. Wallace, Inc. v. US*, COFC No. 96-222, December 15, 2004, the contractor challenges the assessment of liquidated damages for 250 days in a Navy contract where the government had provided defective specifications for a portion of the work. The court discusses the issues of sequential and concurrent delays and the requirements of FAR Clause 52.249-10. The court remits damages for only 21 days finding that plaintiff failed to prove that the defective specifications caused the bulk of the delay and secondarily, that plaintiff failed to meet the FAR notice requirements for much of the delay.

In *J.C. Equip. Corp. v. England,* 360 F.3d 1311 (Fed. Cir. 2004), the Navy hired a contractor to repair a fresh water system and tank at a California Navy base. During construction, the parties agreed to 42 change orders. The parties' contract contained a "Waiver and Release of Claims" clause, which required the contractor to include in each change order all types of adjustments, including those arising out of delay or disruption, to which the contractor claimed entitlement. After relations between the parties soured, the contractor filed 44 separate claims with the Armed Services Board of Contract Appeals seeking adjustments arising from change orders.

The Court ruled the contractor's additional claims were waived at the time the change orders were executed because it failed explicitly to reserve them as required by the "Waiver and Release of Claims" clause. The language of the contract was clear and unambiguous in requiring the contractor to include in a change order all items for which an equitable adjustment would be

sought. Thus, many of the contractor's additional 44 claims were released upon its execution of change orders that did not except such claims. Had the contractor wanted to preserve its rights to later pursue delay adjustments related to the change orders, it should have expressly excepted them from the releases.

Record Steel and Construction, Inc. v. US, COFC No. 03-2274C, October 19, 2004, Corps of Engineers contract at Offutt Air Force Base for the construction of a dormitory. The Court finds that both parties interpretation of the contract language was reasonable, and therefore ambiguous. Finding that the ambiguity was not patent and that plaintiff relied on its reasonable interpretation, the court grants plaintiff's motion for summary judgment on this issue. The Court also holds that the COFC has jurisdiction, under the 1992 amendments to the CDA, over a declaratory relief claim related to correction of plaintiff's performance evaluation record on this contract.

Hawaii Cyberspace, ASBCA No. 54065, 04-1 BCA ¶ 32,455. Appellant appeals from the denial of several claims, two of which were in excess of $100,000. None of the claims were signed when submitted to the contracting officer. The Board dismisses the two claims in excess of $100,000 holding that the failure to sign a CDA certification is a failure to certify that is not curable or otherwise addressable as a defective certification under 41 U.S.C. 605(c)(6).

E. Appeal

Riley & Ephriam Construction Company, Inc. v. US, COFC No. 03-177C, July 29, 2004. The receipt by the Post Office of certified mail on November 30, 2001 is receipt by the contractor even where the contractor does not collect the mail from its Post Office box. Judge Baskir then dismisses plaintiff's appeal filed in January 2003 as time barred by the CDA.

Malaspina Investments, Inc., AGBCA Nos. 2003-180-1. 2003-189-1, 04-1 BCA ¶ 32418. AGBCA finds that it has jurisdiction of an appeal timely filed by subcontractor where a letter from prime's president sent after 90 day appeal period had expired stated that prime's project coordinator had requested subcontractor to send appeal directly to the Board. Given these facts the AGBCA found the prime had authorized the appeal and the Board therefore had jurisdiction.

In *Cems Inc. v. United States*, COFC Nos. 99-951C, et al, April 22, 2005, the government was required to pay the contractor's attorneys fees under the Equal Access to Justice Act. The court found that the contractor had met the difficult burden of showing that the government's position was not substantially justified because they concluded that the contracting officer had relied too heavily on a consultant in issuing a final decision. The actions of the contracting officer showed a "pattern of detachment of the contracting officer from the claim adjudication decision making process reflected in the records in this case demonstrates the contracting officer released his responsibility to such degree that his actions, or inactions, were unreasonable."

F. Patents

In *Campbell Plastics, Eng. & Mfg., Inc.,* ASBCA 53319, 03-1 BCA ¶ 32,206 (2003), the Board strictly adhered to the language requiring a contractor to timely disclose a new invention to the government. In that case, the Contracting Officer decided that the invention had not been timely disclosed and issued a final decision exercising the government's right under the patent clause to assume title to the invention. The contractor appealed, alleging that in fact it had been disclosed in sufficient detail and that the remedy chosen by the government was "draconian." The contractor lost. The Board determined that the disclosure was not merely flawed in form, but that the contractor's purported "disclosures" did not identify the sonic log in technique as an invention. While the Board recognized the harshness of the forfeiture, it found that the Contracting Officer's decision was clearly authorized by statute and in the clause.

In *Campbell Plastics Engineering & Mfg., Inc. v. Brownley*, CAFC NO. 03-1512, November 10, 2004, the Court of Appeals for the Federal Circuit affirmed the ASBCA decision upholding the government's demand for title to an invention because the appellant failed to disclose the invention as required by the contract.

G. False Claims Act

United States ex rel. Bettis v. Odebrecht Contractors of California, Inc., 297 F.Supp.2d 272 (D. D.C. 2004). The Army Corps of Engineers ("COE") entered into a multi-million dollar contract

with a contractor for a six-year dam construction project. The contractor's bid was almost $30 million below the second lowest bid. During construction, the contractor received more than $100 million over its bid through requests for equitable adjustment, but nonetheless incurred a loss in excess of $30 million on the project. A False Claims Act ("FCA") against was brought against the contractor based upon allegations that, among other things, the contractor had fraudulently induced COE to award it the contract by submitting an intentionally low bid on the project, while intending to seek modifications during construction to make up the difference in price. The Court ruled: A contractor does not incur liability under the FCA merely for intentionally submitting a low bid with the intent to seek payment in excess of that bid price through future requests for adjustments. The FCA protects government funds and property from false or fraudulent claims. Unlike for an artificially *inflated* bid, the FCA does not impose liability merely for submitting an artificially *deflated* bids. Since there are numerous legitimate adjustments that could increase a contract price beyond the bid price, proof that a contractor fraudulently induced the government to enter into a contract by making an intentionally low bid, then attempted to obtain monies in excess of the bid price, is alone insufficient to create liability under the FCA. Instead, to incur liability, the contractor must make a claim "for money to which [it] is not *legitimately* entitled."

H. Right to Tax Refunds

In *Department of Energy–Disposition of Interest Earned on State Tax Refund Obtained by Contractor,* B-302366, July 12, 2004, the GAO ruled that the federal government is legally entitled to a refund of state taxes plus interest that the state of Washington gave to Fluor Hanford, Inc. (FHI) for taxes that FHI paid under a contract with the Department of Energy. Because the department previously reimbursed FHI for those taxes, the department is entitled to retain and to credit to its appropriations the principal portion of the state tax refund. However, the department may not retain or credit to its appropriations interest amounts paid by the state along with the refunded taxes. The interest amounts must be credited to the general fund of the Treasury as miscellaneous receipts, pursuant to 31 U.S.C. § 3302(b).

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I. Improper Exercise of Options

In *NVT Technologies, Inc.,* EBCA No. C-0401372, December 09, 2004, the Nuclear Regulatory Commission improperly exercised an option, but directed that appellant do the work. Appellant claims its costs plus a reasonable profit. NRC defends arguing "that the improper exercise contractually bound NVT to perform the option work at the option price, and only entitles NVT to additional compensation for performing additional work not covered by the option." The EBCA rejects this argument as bordering on being frivolous, and holds that appellant is entitled to its costs pus a reasonable profit. Judge McCann concludes "If NRC's position were upheld, there would never be any damage caused by the improper exercise of an option and, accordingly, no recovery by the contractor. Under such circumstances, the Government could, with impunity, improperly exercise options, direct contractors to perform, and, nevertheless, pay contractors only the option price for performing the work. This price could be substantially less than the contractor's costs. This would put a contractor in the unenviable position of not agreeing to perform the option work, yet being forced to perform that work at a loss, an absurd result."

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